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DEC 28 1973

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-801

MELVIN T. SMITH, *Petitioner*

v.

FERRON C. LOSEE, ANDREW H. BARNUM, DALE PETERSON, LEGRAND P. BACKMAN, SHELDON S. ALLRED, EDNA H. BAKER, DEXTER C. SNOW, A. REED MORRILL, N. RUSSELL TANNER, HELEN B. URE, GAYLE E. RIDDLE, AND LYNN S. RICHARDS, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This reply brief is filed for the purpose of clarifying two points raised by respondents' brief in opposition.

I

Respondents contend that petitioner was not denied procedural due process, because he was offered and declined two opportunities to be heard before the Utah

State Board of Education. Although the due process issue is immaterial at this stage, since both the District Court and the Court of Appeals found the termination of petitioner's employment to have been *substantively* invalid because it was based upon his free speech activities, we believe this Court is nevertheless entitled to know the facts.

On Tuesday, May 13, 1969, (*after* the decision to terminate petitioner had already been made), petitioner received notice that the Board of Education would give him a hearing the following Thursday, May 15. Petitioner's counsel requested a postponement of the hearing, on the ground that the two-day notice did not allow adequate time for preparation and, in any event, counsel would be unavailable on that date. (Pltf. Ex. 13). The postponement was granted, and a new hearing date was subsequently set for June 27, 1969 (Pltf. Ex. 14). In the interim, however, a new state statute was enacted which transferred jurisdiction over Dixie College from the State Board of Education to a newly created State Board of Higher Education. Petitioner's counsel therefore sent a letter to the Attorney General requesting "that the hearing not be conducted before the Board of Education but referred to the State Board of Higher Education for consideration, unless the office of the Attorney General issues an opinion that the State Board of Education will be the governing board for Dixie College on and after June 27, 1969, and that a determination by the board that Mr. Smith . . . [is] entitled to re-employment with or without tenure will be binding upon the State Board of Higher Education and the administration of Dixie College." (Pltf. Ex. 16) The letter also stated: "If you decide that the board does have power to reinstate

Mr. Smith . . ., we will want to proceed." Moreover, the letter requested certain specified information which counsel said he needed to prepare for the hearing, thus making clear his desire to appear before whichever tribunal had jurisdiction.

The Board chose to construe this letter as a request to cancel the hearing, and the hearing was therefore never held. (Pltf. Ex. 17). We submit, however, that the Board's interpretation is not supported by the record. Neither the District Court nor the Court of Appeals—with the single exception of Judge Barrett—agreed with respondents' contention that petitioner had rejected the offer of a hearing.

II

Respondents contend that "the Court of Appeals did not rule that damages could not be awarded for humiliation, injury to reputation, or disruption to career plans, but rather it found that the evidence in the instant case did not support an award of damages . . ." (Br. in Opp. p. 4).

The District Court's finding on the injury suffered by petitioner was quite specific:

> "20. Plaintiff was harassed at the college. Since termination of plaintiff's employment, he has become a dangerous subject on the Dixie campus. One effect of defendants' actions was to seriously damage plaintiff's reputation among students and his former colleagues at Dixie Junior College and other colleges. Formerly highly regarded by and popular with students and faculty alike, plaintiff had been elected president of the faculty association, and was later elected a member of the personnel committee. Since the announcement of the

> termination of his employment, he has been shunned by his former faculty members. Because of defendants' actions, plaintiff found it impossible to obtain another position as a history teacher for which he has spent years of preparation, and he finally took a non-teaching position with the Utah State Historical Society." (Pet. 42a-43a).

There is nothing in the Court of Appeals' opinion to suggest that it considered this finding to be lacking in evidentiary support. Indeed, the finding is an accurate paraphrase of the testimony of two of petitioners' fellow faculty members (A. 159-62, 166-68) and of petitioner himself. (A. 169-71) Moreover, the Court of Appeals acknowledged that "Smith applied to 'sixty or seventy' other colleges for employment but never received an offer" (Pet. 6a) and that "he was, in the words of the trial court, harassed by defendants Losee and Barnum." (Pet. 19a) It held, however, that petitioner "is entitled to no damages just by reason of a change of jobs," and it noted that "there is no pendent cause for defamation or any related cause." (*Ibid.*)

It is thus apparent that the Court's view was that the injuries described in the above-quoted finding of the District Court are not compensable in an action under 42 U.S.C. §1983, not that the finding itself was unsupported by the evidence.

Judge Doyle, who disagreed with the Court on the damage issue, read the majority opinion the same way. Thus, his dissenting opinion did not even discuss the question of whether the District Court's findings on the damage issue were adequately supported by the evidence—as it certainly would have if he had thought that to be the basis for the majority's decision.

Rather, his argument was that, as a matter of law, petitioner was "certainly entitled to some award for humiliation or to injury to his reputation, or both." (Pet. 35a).

Respectfully submitted,

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